Arbitral Awards in Japanese Law*

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* This paper has been prepared for a report at the session on International Commercial Arbitration of International Law Association Belgrade Conference on August 22, 1980.

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Introduction

I am honored to speak on "Arbitral Award in Japanese Law" in this friendly Yugoslavia where the Economic Chamber has a Foreign Trade Court of Arbitration for business and maritime disputes arising in foreign trade relations.(1)

The Code of Civil Procedure adopted in 1890, contains provisions for an arbitration procedure. Those provisions initially drew heavily on the German system. It is said that arbitration clauses are chiefly employed in agreement with foreign business firms.

The Construction Industry Law (Law No. 100 of 1949, arts. 25-15 to 25-20) provides both arbitration and mediation procedures for disputes arising out of construction contracts.

I will explain only the outline of Arbitral Awards that the Code of Civil Procedure Book VIII provides. Because effective Transnational commercial arbitration is governed by national laws and the procedures conducting an arbitration should become familiar to businesspeople. In addition, the arbitration procedure shall be regulated under the statute (e.g. Law No. 221 of 1948) or other regulations of the Arbitration Institute (e.g. The Japan Commercial Arbitration Association), in conformity with the Code of Civil Procedure Book VIII.

(1) Art. 37, para. 1 of Law on Incorporation into General Associations and the Economic Chamber of Yugoslavia provides that the Chamber shall have a Foreign Trade Court of Arbitration for business and maritime disputes arising in foreign trade relations between organizations of associated labour and Foreign physical and juristic persons if the parties have agreed to its jurisdiction.

I. Principles of decision

The arbitrators should apply the law designated by the parties. There is no check that arbitrators apply the law. Because Japanese law does not allow an appeal to the courts on the merits of an award. Some one adopts the attitude that arbitrators are entitled to follow their own views on equity and fariness. I do not agree with this attitude. The rules of the law should be applied. The law of June 9, 1951 on conciliation in civil cases seeks to find equitable and practicable rather than legal solutions to civil cases, based on mutual concessions made by the parties. The arbitral award should, however, find legal solutions to civil cases. Because the arbitrators should render a valid award that will be enforceable by court action if the losing party does not comply. A party may contest the award on a ground that the award condemns a party to perform an act, which is prohibited by law. (Arts. 801, 805).(2) In cases of a transnational character the arbitrators must apply the law indicated by the choice of laws system.(3)

(2) Civil Procedure Law (hereinafter C.P.L.) Art. 801 states:
Application to set aside the award may be made:
1. – – –
2. Where the award condemns a party to perform an act which is prohibited by law;
C.P.L. Art. 805 states:
The Court competent in action for – – – the annulment of an award – – – is the Summary Court or the District Court –.
C.P.L. Art. 794, para. 2 states:
If the absence of any agreement of the parties as to the procedure, it shall be regrulated by the arbitrators according to their discretion. Therefore, Great Court of Cassation, April 15, 1917, 24 *Daishinin Minji Hanketsu Roku* (Reports of Civil Great Court of Judicature Cases) 865 held that the parties may designated foreign procedure law.

(3) Koshikawa, Transnational Arbitration, A Collection of Themes and Essays in Commemoration of the 30th Anniversary of the Founding of the Meijo University, March 25, 1978, pp. 185 ff.

II. Contents of award

(1) Reasons for the award

The Code provides that reasons must be given unless the parties have agreed otherwise (Art. 801).

Firstly, it is necessary to arrive at a correct result that arbitrators give reasons for their awards. Because to write the reasons is a powerful aid in the mental work necessary to make a decision. Secondly, their written reasoning in civil disputes might serve as a guide for future civil relations and thus prevent possible disputes on similar issues. That is why reasons must be given. However, a detailed reasoning might impair the speedy method of settling disputes. That is why rendering awards without written reasons is based on the agreement of the parties to have their disputes settled with speed and finality.(4)

(2) Keeping within authority

In deciding the case, the arbitrators should only decide the matters referred to them. They must not go beyond the relief claimed. They must not base their decision on matters that were not submitted to them. They should also not exceed their powers by dealing with persons who were not parties to the arbitration agreement. Any departure from the above-mentioned restrictions constitutes a procedural irregularity (see, Art. 800). A valid award must identify the parties and the disputes, and be clear and final so that no further action will be necessary to determine the right and obligations of the parties.

(4) Under English law, Art. 1 of Arbitration Act 1979 provides that in the Arbitration Act 1950 section 21 (statement of case for a decision of the High Court) shall cease to have effect and the High Court shall not have jurisdiction to set aside or remit an award on an arbitration agreement on the ground of errors of fact or law on the face of the award. As the result of this amendment, giving reasons for the award will increase to some extent in England.

(3) Award by consent

If the parties reach a settlement after the transmission of the file to the arbitrator, then the settlement is to be recorded in the form of an award by consent. This would be by analogy with the rule applicable in the courts under the Civil Procedural Law.(5)

(4) An Award period

The parties are free to fix a limit themselves, but if they fail to do so the code does not lay down the period in Japan.

Parties, by mutual agreement, are free to extend the award period to allow the arbitrator enough time to make a careful investigation of lots of evidence and witnesses submitted in support of the parties' contentions.

If the parties fix the time in which the award must be rendered, and the award is not given by that time, there is no longer any authority for the arbitrator to act. The party opposing arbitration may employ the provision setting such a time limit to contest the award on a ground that arbitration procedure was inadmissible. (Art. 797, Art. 801, No. 1).(6)

(5) C.P.L. Art. 356, para. 2 states that on a compromise being arranged, it must be entered in the protocol.

(6) C.P.L. Art. 797 states that the arbitrators may continue the procedure and make the award everwhere a party asserts that arbitration procedure is inadmissible, and in particular where it is asserted that no valid agreement of submission exists, that the agreement of submission does not relate to the controversy to be decided, or that the arbitrators are not empowered to functions as such.
C.P.L. Art. 801 states:
Application to set aside the award may be made:
1. Where the procedure was inadmissible;

(5) Majority award

If the arbitrators are unanimous their conclusion but differ as to the reasons, an arbitrator is entitled to have his dissenting opinion set out in the award. In normal cases the arbitrators will reach a majority decision. The Civil Procedure Law provides that if the award is to be made by several arbitrators, a majority of opinions decides, unless otherwise provided in the agreement of submission (Art. 798).(7) But if they fail to reach a majority decision, they do not necessitate to end in the making of a final award (See, Art. 793).(8)

III. Form of the award

The arbitrators should state when and where the award was drawn up. An award must be in writing, and it must be signed and sealed by the arbitrators (Art. 799, para. 1). This is different from a common law award, which can be oral.

An exemplification of the award shall be served on each of the parties. The original is to be deposited at the competant court with the documents of service annexed (Art. 799, para. 2).

(7) cf. English Arbitration Act 1979 Art. 6 (2) states that unless the contrary intention is expressed in the arbitration agreement, in any case where there is a reference to three arbitrators, the award of any two of the arbitrators shall be binding. In the United States, the court also departed from the common law rule requiring a unanimous award of arbitrators. In Clinton Water Association v. Farmers Construction Co., 254 S.E. 2d 692 (W. Va. 1979), the court held that a majority award of the arbitrators was legally binding in the absence of express language requiring a unanimous decision.

(8) C.P.L. Art. 793 provides that the agreement of submission is no longer operative in the absence of previous provisions, arranged by the parties, where the arbitrators notify the parties that their opinions are equally divided.

IV. Effect of the award

Civil Procedure Law provides in Article 800 that between the parties the award has the same effect as a final and conslusive judgment of a Court of Justice.(9) A foreign award has also the same effect as a domestic award.(10)

(1) *Res Judicata*

A valid award constitutes *res judicata,* courts and arbitral tribunals must in future accept the award as a final and conclusive solution of the matter decided in the case.(11) Therefore, once an valid award has been rendered, the matters settled by the award are no longer subject to future arbitration or litigation.

(2) Enforcement

The award, unless it is purely declaratory in character, becomes enforceable.

(9) cf. Art. 37, para. 2 of Law on Incorporation into General Associations and the Economic Chamber of Yugoslavia provides that a ruling by the Foreign Trade Court of Arbitration is final and shall be enforceable forthwith.
Under the common law a suit is commenced to enforce the common law award. The award would be evidence of duty owned.

(10) Tokyo District Court, October 20, 1967, 18 *Kakyu Minji Saiban Reishu,* (A Collection of Civil Cases in the Inferior Court) 1033.

(11) cf. Lakeside Hospital v. Government Employees Insurance Co., 417 N.Y.S. 2d 16 (App. Div. 2d Dept. 1979); United Nuclear Corp. v. AAA, No. 78-522-B, decided September 27, 1978 (D.N.M.).
Under the statute of Nebraska, the judge will confirm the award of record. (Neb. Rev. stat. §25-2116). The judgement entered by the judge on the award is appealable to the Nebraska Supreme Court. (Neb. Rev. stat. §25-2177 (Reissue 1975)). Under the Nebraska statute there would not be a *res judicata* effect as to all matters that might have been raised in the arbitration proceeding. (Neb. Rev. stat. §25-2106 (Reissue 1975)).

V. Enforcement of an award

Parties are usually to abide by the award, because of an agreement for the submission of a controversy to one or more arbitrators (see, Art. 786).(12) In addition, they want to continue business relations between them.

The court must give confirmation by way of a judgement of execution (Art. 802, para. 1).(13) A foreign award can be enforced by obtaining a judgement of execution from the court in the same way as a domestic award.

Modern arbitration laws in many countries provide for some kind of simpler procedure against a party who does not adhere to the terms of the award. Enforcement procedure in the Japanese law should be amended to reach speedy solution of the disputes. According to Article 125, paragraph 1 of the Japanese Code of Civil Procedure, parties to actions must orally debate the actions in Court. However, with regard to cases of enforcement of awards, the Court should determine whether or not oral proceedings are to be held.(14)

(12) C.P.L. Art. 786 states that an agreement for the submission of a controversy to one or more arbitrators is valid in so far only as the parties are entitled to conclude a compromise with reference to the subject-matter in dispute.

(13) C.P.L. Art. 802, para. 1 states that execution in virtue of an award can only take place where the admissibility thereof has been pronounced by way of a judgment of execution. Supreme Court, Jan. 25, 1979, *HANREI JIHO* (The Case Journal) 917.

(14) See, Koshikawa, An Amendment to Book VIII Arbitration Procedure of the Code of Civil Procedure, *Chukyo Hogaku,* Vol. 15, No. 1, 1980, pp. 11 ff.

VI. Application for the annulment of the award

A party may contest the award on certain grounds clearly specified in the law. A party dissatisfied with an award must bring an action in the proper court alleging grounds to set aside the award (Arts. 801-805).

The grounds are confined to cases where matters of public order must be taken care of, or where safe-guards must be provided for a fair procedure. The aim is to set aside the award as few as possible. Courts will not review the facts found by the arbitrator, his application of the law except public order. Because arbitral award is a solution of the disputes submitted to arbitrator in whom the parties expressed confidence.

Then the civil procedure law provides clearly the grounds.

The grounds are:

(1) matter non-arbitrable (Art. 786);

(2) no valid arbitration agreement (Art. 797);

(3) an act which is prohibited by law (Art. 801, No. 2);

(4) unfair procedure (Art. 801, Nos. 1, 3, 4);[15]

(5) defect in form (Art. 801, No. 5);[16] or

(15) C.P.L. Art. 801, No. 1 states: the procedure was inadmissible.
C.P.L. Art. 801, No. 3 states: the parties were not represented in accordance with the provisions of the law in the arbitration proceedings.
C.P.L. Art. 801, para. 1, No. 4 and para. 2 provides that the parties were not heard in the arbitration proceedings unless waived in the arbitration agreement.

(16) C.P.L. Art. 801, para. 1, No. 5 and para. 2 provides that the award does not include a state of the reasons for it unless waived in the arbitration agreement.

(6) improper procurement of award such as corruption of the arbitrator or other undue means by which an award was procured. (Art. 801, No. 6, Art. 420, Nos. 4 to 8).[17]

Conclusion

The leaders of the *Meiji* legislation took the fast and efficient way of borrowing the codes of the Continental countries. They intended to persuade the Western Nations to consent to the proposed revision of the unequal treaties. The Code of Civil Procedure is not exception to this. In addition to the hasty *Meiji* legislation, social conditions have greatly been changed compared with those of the *Meiji* era. The amendment to provisions on arbitration procedure (The Code of Civil Procedure Book VIII) is now urgently needed.[18] A comparative study of the various systems of law is very valuable for our country. I hope the explanation of our arbitration law is also helpful to a comparative study and drafting an arbitration law.

Addendum:

I touched up the report and prepared foot notes on September 17, 1980.

(17) Arts 3 and 4 of English Arbitration Act 1979 provides exclusion agreements which exclude the right of appeal in relation to an award to which the right of appeal in relation to an award to which the determination of the question of law is material.

(18) See, Koshikawa, An Amendment to Book VIII Arbitration Procedure op. cit. supra note (14), at 1 et seq.